BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MIKE J. SMITH Claimant	)	
VS.	)	
FOODLINER, INC. Respondent	)	Docket No. 1,032,976
AND	)	
ZURICH AMERICAN INS. CO. Insurance Carrier	)	

ORDER

Respondent requests review of the March 13, 2007 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant was injured by accident arising out of and in the course of his employment with the respondent over a series of dates beginning November 10, 2006 through January 12, 2007, and that claimant provided timely notice of his injury. Accordingly, he ordered that claimant be paid temporary total disability payments and medical treatment through Dr. John Gorecki.

The respondent requests review of whether the claimant's injury arose by accident out of and in the course of his employment and whether timely notice of an accident was given. Respondent argues the claimant did not injure himself in the course of his employment commencing November 10, 2006, but rather injured himself while at home on November 12, 2006. Respondent further argues that although claimant alleges a series of injuries in the working days that followed along with another separate lifting incident on January 4, 2007, while at work, the medical records do not corroborate this version of events. Moreover, respondent maintains that the first notice it had of any work related injury came on January 10, 2007.

Claimant argues that the ALJ should be affirmed in all respects. Claimant essentially argues that he must have hurt his back at work on November 10, 2006 and that the pain increased over the weekend culminating in the need to seek emergency treatment on November 12, 2006. Claimant also argues that he suffered another injury on January 4, 2007 when he lifted a heavy blower while at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant is a diesel mechanic for respondent, performing routine maintenance, including changing light bulbs and oil changes. At times, there was more involved maintenance such as changing out blowers for pneumatic trailers. According to the claimant this work can be "pretty heavy". On November 10, 2006, claimant worked his regular shift and then was off for the weekend. On Sunday, November 12, 2006, claimant was sitting on a couch and went to get up, when he discovered pain in his right hip making it nearly impossible for him to stand.

Claimant went to the emergency room for treatment. These records reflect no history of injury or unusual activity, but does mention claimant's job as a mechanic. There is no indication of hurting his back while at work on Friday, November 10, 2006.

Claimant contacted Brad Gilchrist, his manager, on Monday, November 13, 2006, and told him he "had real bad pain in my back, lower back, down my hip, and that they took me off work and I was supposed to follow up with my medical doctor."[1] Claimant sought further treatment and following an MRI, was diagnosed with a bulging disk on November 20, 2006.

According to claimant, he was given a 10 pound lifting restriction but he was thrown "right back in the fishbowl" performing his regular duties.[2] Brad Gilchrist disputes this and says claimant's work duties were limited to oil changes once respondent learned of claimant's physical problems.

Claimant then testifies that while doing his regular duties he aggravated or reinjured his back on January 4, 2007 while lifting a blower.[3] He notified Brad Gilchrist of this injury on January 10, 2007.

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[1] P.H. Trans. at 7.

[2] *Id.* at 8.

[3] *Id.* at 8-9.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[4] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[5] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[6] The existence, nature and extent of the disability of an injured workman is a question of fact.[7] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[8]

In addition to proving a compensable injury, claimant must also provide notice of the injury. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The difficulty in this case is not in the claimant's diagnosis or need for treatment. Rather, it is in the fact that the medical records contain a recitation of history that seems to be inconsistent with claimant's version of his injury or injuries. And the fact that respondent's version of the events is wholly different from that offered by claimant.

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[4] K.S.A. 2005 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[5] K.S.A. 2005 Supp. 44-501(a).

[6] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[7] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[8] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Claimant has not indicated that any particular event occurred on Friday, November 10, 2006 while working other than to say that his work as a diesel mechanic can be "pretty heavy". And while he denies that he did anything over that weekend that caused his back to become injured, he admits working on his son's car. He seems to contend that his back slowly became worse after leaving work on Friday the 10th and by Sunday, the 12th was sufficiently worse so as to compel him to seek emergency treatment. But this is not reflected in the emergency rooms records. In fact, the one legible note in those records reflects "Developed pain R [right] hip while sitting on a couch. No hx [history] of injury or unusual activity".[9] This recitation is inconsistent with a lasting period of pain commencing while at work on Friday, November 10, 2006 and continuing until Sunday, November 12, 2006.

Although claimant maintains he told his supervisor of his back related injury, his own testimony suggests otherwise. Claimant testified at the preliminary hearing that on November 13, 2006 he called and told Mr. Gilchrist that he had pain in his lower back and was taken off work. This is not the same as advising Mr. Gilchrist that he has suffered a work-related injury. Mr. Gilchrist testified that he did speak to claimant on November 13th and was advised that claimant wouldn't be in to work that day. When he asked why, he remembers claimant telling him that he had been working on a vehicle that weekend "and he's not sure what he did, but he was sitting on his couch Sunday, sometime Sunday evening, had showered, eaten dinner, watching TV, stood to get up and said he could not move."[10] Mr. Gilchrist further testified that claimant did not relate this to his work activities nor did he request treatment. Mr. Gilchrist's recitation of the conversation is consistent with that contained within the medical records at the emergency room.

After that, claimant apparently was off work for a period of time, had an MRI, some epidural injections and then returned to work. Then, on January 4, 2007 he indicates he was moving a blower and reinjured or aggravated his back. It is unclear precisely when claimant says he notified Mr. Gilchrist of this second injury, although Mr. Gilchrist testified that he learned of the alleged injury on January 10, 2007. On that date, claimant was talking to Mr. Gilchrist and told him of an upcoming doctor's appointment and the need to file workers compensation papers. Mr. Gilchrist testified that he told claimant that he believed this (meaning the earlier event in November 2006) was not work-related. Claimant indicated that the doctors now have told him that his back problems were indeed work-related and then he mentioned the lifting incident with the blower from several days earlier.

This is not the only conversation the two of them had regarding claimant's schedule. On January 8th, claimant told Mr. Gilchrist of another doctor's appointment occurring later

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[9] P.H. Trans., Resp. Ex. 2 at 2 (Wesley Medical Center Triage-Form A).

[10] Gilchrist Depo. at 7-8.

in the week. During this conversation claimant made no mention of the January 4, 2007 lifting accident or the work-related nature of the November 2006 event.

Although the Board will, in certain instances, give the ALJ some deference when credibility is at issue, under these facts and circumstances this Board member is not persuaded that claimant sustained an accident arising out of and in the course of his employment either on November 10, 2006 or over a series of dates between November 10, 2006 and ending on January 12, 2007. First of all, claimant's own testimony does not establish that his injuries occurred over a series of days. To the contrary, claimant testified that he must have hurt his back at work on November 10, 2006 doing "various vigorous activities" because he "surely [sic] did not herniate his disc while sitting on a couch at home."[11] What those work activities were is, like respondent maintains, a mystery. Claimant seems to argue that since he couldn't possibly have hurt himself while sitting on the couch, it must have happened at work.

Mr. Gilchrist's recitation of claimant's explanation of the events of November 10-12, 2006 squarely matches with the emergency room records. Claimant reported no acute injury or event other than sitting on his couch, when he went to get up and experienced pain in his right hip. Even the subsequent medical records, those that are attached to the preliminary hearing, do not describe heavy repetitive lifting at work. And claimant's own statement to the insurance adjuster includes his admission that he does not know what he did to injure his back.

There are similar inconsistencies with claimant's recitation of the events of January 4, 2007. In this instance, claimant points to a singular event, that of lifting the blower. This event was apparently unwitnessed although there is some evidence that these blowers weigh several hundred pounds. But there is no contemporaneous medical record relating to this event. In fact, the January 9, 2007 medical notes from Dr. Gorecki do not reflect any work-related event on January 4, 2007 or any connection whatsoever before that time.

Claimant had conversations with Mr. Gilchrist during this same time period and he did not mention the event until January 10, 2007.

After considering the record as a whole, this Board Member is not persuaded that claimant has met his burden of proof in this matter. The lack of consistency or corroboration calls into question claimant's version of the events, particularly on November 10, 2006. And it is clear claimant had a bulging disc as of November 20, 2006. What, if anything, occurred on January 4, 2007 is unclear from this record.

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[11] Claimant's Brief at 3 (filed Apr. 13, 2007).

This Board Member remains unpersuaded that claimant sustained either an acute injury on November 10, 2006 or on a series of dates up to January 12, 2007. Thus, the ALJ's preliminary hearing Order is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[12] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated March 13, 2007, is reversed.

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

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BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Darin M. Conklin, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[12] K.S.A. 44-534a.